**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV 2013-4600**

In the matter of Section 4 and 5 of the Constitution of the Republic of Trinidad and Tobago

**AND**

In the matter of the Application by Ferney Bohorquez a prisoner at Golden Grove Maximum Security Prison Arouca under section 14 of the Constitution of the Republic of Trinidad and Tobago, alleging that certain provisions of the said Constitution have been contravened in relation to him

**BETWEEN**

**FERNEY BOHORQUEZ**

***Claimant***

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

***Defendant***

**BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR**

**APPEARANCES:**

Mr. Joseph Sookoo for the Claimant

Ms. Antoinette Alleyne instructed by Mr. Sean Julien for the Defendant

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## Reasons for Decision

**Background**

1. The claimant was convicted of possession of a dangerous drug for the purpose of trafficking. The drug was cocaine - 21.3kg of it. He was sentenced on October 17th 2008 to 10 years imprisonment to run from the date of his conviction **- October 3rd 2008**. He alleges that he appealed his conviction and sentence but the Court of Appeal affirmed both conviction and sentence on **July 29th 2010**.

2. He claims that the time he spent on remand of in excess of 3 years from date of his arrest on **December 6th 2004** until the date of conviction, was not taken into account, either by the High Court or by the Court of Appeal.

3. However, subsequently, on **October 9th 2012** the Court of Appeal in the decision of **Borneo v The State Cr App 7 of 2011** (***Borneo***) made it clear that the time spent in custody on remand should be taken into account, after the appropriate sentence, including the gravity of the offence as well as mitigating and aggravating factors, is determined. That appropriate sentence should be pronounced to run from the date of conviction, and there should be then deducted expressly from that appropriate sentence the full presentence period spent in custody on remand awaiting trial for the offence.

4. He claims that, as he did not receive the "benefit" of the ***Borneo*** decision, his rights to liberty and equality of treatment are being infringed as others, unlike him, whose appeals were

determined subsequent to ***Borneo***, were receiving the appropriate deduction from their sentence of the time they spent on remand.

5. He claims that further, he is entitled to a remission of sentence to the extent of one third for good behaviour. Accordingly he claims that when the time he spent in custody is deducted from his sentence, and the time that he claims to have remitted from his sentence is similarly deducted, he is in fact entitled to be released immediately, as his sentence, appropriately calculated, would have terminated since October 25th 2012.

**Issues**

6. 1. Whether the applicant is entitled to have deducted from his sentence:

a. time spent on remand and,

b. time served reduced by one third for good behaviour.

2. Whether the applicant's constitutional rights to:-

a. liberty,

b. equality before the law/equality of treatment,

have been infringed by:-

a. the failure of the Court of Appeal to have afforded him the deduction from his sentence of time spent by him on remand,

b the failure to have the deduction of time spent on remand awaiting trial applied, administratively, to his sentence,

c. the failure to have his sentence reduced by one third for his good behaviour.

3. If so, whether the applicant is entitled to constitutional relief, including the right to immediate release.

**Conclusion**

7. The claimant has not demonstrated any breach of any constitutional or other right. Accordingly he is not entitled to any constitutional or other relief.

8. The claimant's application is dismissed on the grounds that it is an abuse of process for the reasons set out hereunder including:-

i. the assertion that "*the State, its servants or agents had no lawful justification for arresting and detaining the applicant*" is unsustainable in circumstances where he had the benefit of :-

a. a trial, where he was found guilty of the charge, and

b. an appeal to the Court of Appeal, where after written submissions and argument a full 56 paragraph written decision was delivered.

ii. The transcript of the hearing of the appeal, and the claimant's filed written submissions on appeal, reveal that the issue of his sentence was not raised in his submissions or pursued at the time of hearing of his appeal.

9. In any event the contention that his sentence would have been **automatically** reduced by the time he spent on remand, **if that point were available** to be taken on appeal, is flawed as

a. the point **was available** to be argued on appeal at the time of hearing of his appeal, and

b the decision in ***Borneo***, as the facts and outcome in ***Borneo*** themselves demonstrate, permits the sentence to be **increased** on appeal, **even if time spent on remand is deducted**, resulting in

i the possibility of the same sentence being affirmed,

ii. the possibility of sentence being reduced, or even

iii. the possibility of sentence being increased.

Reduction is therefore **not** the automatic result of a resentencing exercise applying the principles in the cases of either the decision in ***Borneo,*** or **Callachand v State of Mauritius [2008] UK PC 49 (*Callachand*)**.

iv. even if the Court of Appeal had failed to consider arguments, on the reduction of his sentence by the time spent on remand, (and the evidence is entirely to the contrary), the application amounts to a collateral attack on the sentencing discretion of the Court of Appeal, with no good reason or cogent explanation having been provided for the claimant's failure to avail himself of the necessary **alternative** remedy of a **timely** appeal of the decision of the Court of Appeal.

10. It is not simply not accurate to contend that that argument was not available to him at the date of hearing of his appeal. It clearly was available. The Privy Council decision in ***Callachand*** was then available to him, just as it was to the applicant in ***Borneo***.

11. In fact, however, it was not even necessary for ***Callachand*** to have been decided in order for the applicant to have **raised the issue** of deduction from his sentence by time spent on remand. As set out and explained in **Ramberan Cr App 14 of 2010 del. May 9th 2013 at page 17,** the courts had been considering this issue, and deducting time spent on remand in appropriate cases, (for example, **Paul Williams v The State 57 WIR 380 (*Paul Williams*),** and **State v Seecharan HCA 74 of 2007**), although before ***Borneo*** they were not doing so in every case.

12. The application is therefore an abuse of process -

a. on the ground of both **delay (**being filed on November 8th 2013, more than 3 years after the decision of the Court of Appeal on his appeal**)**, and

b. as constituting a **collateral attack on a decision which could properly have been the subject of an appeal**.

c. the applicant has **not demonstrated as a matter of fact** that he is **similarly circumstanced** to others who have received a sentence which expressly deducts time spent on remand.

If

(i) he failed to pursue a claim to a reduction in sentence on appeal, and

(ii) permitted time for a further appeal on sentence to the Privy Council to elapse, (even assuming that he were in fact dissatisfied with the initial sentence of 10 years imprisonment for possession of a dangerous drug, (21.3kg of cocaine) for the purpose of trafficking),

then he cannot claim to be similarly circumstanced to others who challenged sentence on appeal resulting in a reduction of their sentence .

In any event the contention that he received unequal treatment, because others allegedly received the "benefit" of the decision in ***Borneo*** by having their sentences reduced by the time spent on remand awaiting trial, is fundamentally flawed as there is in fact no such automatic "benefit" or deduction as a result of the ***Borneo*** decision, as demonstrated above.

**Orders**

13. i. The claimant's claim is dismissed.

ii. The claimant is to pay to the Defendant costs to be assessed in default of agreement.

**Analysis and Reasoning**

14. The claimant was observed in a motor vehicle in which was found 21.3kg of cocaine. He was the driver of the vehicle. He was charged with a possession of a dangerous drug for the purpose of trafficking. He was found guilty on **October 3rd 2008** and later sentenced to 10 years imprisonment. The sentence was to run from the date of conviction.

**The Applicant's Appeal**

15. He appealed to the Court of Appeal, as did the front seat passenger. She was acquitted by the Court of Appeal which considered the grounds of appeal raised. In a carefully reasoned decision, in which they revisited the issue of who is an occupier under the relevant legislation, the effect of the reverse burden placed on such an occupier, and the constitutionality of such a reversal of the onus of proof, the Court of Appeal declined to apply a previous decision of the Court of Appeal in **Ramdhanie** - Cr. App. 91, 92 of 1997 in relation to the occupation of a motor vehicle.

16. In the final paragraph, (56), of that decision the court, (constituted by the Honourable Justices of Appeal Narine, Weekes and Soo Hon, in which the Honourable Weekes JA delivered the written judgment), affirmed the conviction and sentence of Boroquez. That sentence was 10 years imprisonment. The court in its decision dated **July 29th 2010**, expressly indicated that his sentence was to run from the date of conviction.

17. The claimant contends that the Court of Appeal in ***Borneo*** – (a decision by the Court of Appeal similarly constituted by the Honourable Narine JA, Weekes JA and Soo Hon JA, in

which the Honourable Narine JA gave the written judgment), altered the law in that it applied the Privy Council decisions of ***Callachand*** and **Ajay Dookee**, and decided that the entirety of time spent on remand **must** be deducted from the sentence. The decision of the Privy Council in ***Callachand*** was delivered on **November 4th 2008**. The Court of Appeal's decision in ***Borneo*** was delivered on **October 9th 2012**.

18. Olivares, who was in the back seat of the vehicle, did not appeal, but relies on the same grounds and similar arguments as Bohorquez. As far as his situation is concerned it is clear that if the claimant's argument is accepted, and that ***Callachand*** changed the law, so that time spent on remand should have been taken into account and deducted from his sentence, the fact that ***Callachand*** was delivered after he was sentenced clearly establishes that he cannot contend that the trial judge was wrong in law in not applying law which was not in effect at the time.

19. His argument parallels the argument of Bohorquez however in that he alleges that he, like Bohorquez would not have the benefit of deduction from his sentence of time spent on remand. Both claim to be treated differently and unequally, as compared to other persons who have had, time spent on remand deducted from their sentence, as they claim they are now entitled to have, since the decision in ***Borneo***.

20. The issue of mala fides simply does not arise in the instant case. In order to establish an infringement of the right to equality of treatment they must of course prove the **deliberate** and **intentional** exercise of a power (or discretion), by the defendant /respondent, the exercise of which was **arbitrary** and **unreasonable** in the circumstances which resulted in treatment in

relation to them that was less favourable to them than in relation to others **similarly circumstanced**. (See for example, **Suzette Martin v Attorney General** CV 2009- 00376 delivered February 1st 2010 summarizing the relevant principles).

21. It was contended in effect that in so far as the trial judge at the applicant's trial did not **expressly** deduct the time the applicant spent on remand from the sentence of 10 years he erred in law in not applying the principles in ***Callachand*** or ***Borneo***. It was conceded in submissions that he could not have done so as these cases had not yet been decided.

22. The claimant swears on affidavit that he appealed on conviction and sentence. He contends that in so far as the Court of Appeal did not amend his sentence to expressly deduct the time spent on remand, it erred.

23. His argument is that, further, other prisoners similarly circumstanced to him have, since the decision in ***Borneo***, had the benefit of the deduction, from their sentence, of time spent on remand, and further that he is entitled to a one third remission of his sentence for good behaviour. The result of those two deductions from his sentence would be that he is entitled to be freed immediately, as he would have served his sentence. The decision in ***Borneo*** must therefore be examined.

**The Decision in Borneo**

24. The decision by the Court of Appeal in **Borneo v The State Cr App 7 of 2011** (***Borneo***) was an application of the Privy Council decision in **Callachand v State of Mauritius 2008 UK**

**PC 49 (*Callachand*)**. It also applied a later decision of the Privy Council in **Ajay Dookee v State of Mauritius 2012 UKPC 21** (***Ajay Dookee***) and made it clear that **generally** the **deduction from sentence** of time spent in custody awaiting trial on remand was **not to be discounted** unless particular specific factors applied.

25. However the issue of whether some or all of the time spent in custody awaiting trial on remand, whether discounted or not, was to be deducted from sentence, in fact available to be raised on appeal by the applicant since the decision in Callachand on **November 4th 2008**, which predated the determination of his appeal on **July 29th 2010**. In fact the issue of whether some or all of the time spent in custody awaiting trial on remand, whether discounted or not, was to be deducted from sentence, was available to be raised before the Court of Appeal even before **Callachand** was determined.

**What was the effect of Callachand**

26. The case of ***Callachand*** was clearly available to the claimant Bohorquez to argue on appeal in July 2010. Just as it was available to be argued by ***Borneo*** on his appeal. Borneo chose to do so. The applicant did not. Even if it were not available, and it certainly was, there were other authorities that established that the courts did, though not at that time invariably, deduct time spent on remand. See **Ramberan Cr App 14 of 2010 del. May 9th 2013 at page 17** where the Honourable Soo Hon JA indicated that the courts had been considering this issue, and deducting time spent on remand in appropriate cases, (for example **Paul Williams v The State 57 WIR at 380 (*Paul Williams*)**, and **State v Seecharan HCA 74 of 2007**)

27. It cannot be contended, as the applicant here did, that it would have been an exercise in futility or frivolity to have pursued the applicant's appeal on sentence, as the deduction of time spent on remand was not an unknown possibility at the time of his appeal.

28. Deduction of time spent on remand was definitely a possibility, if the issue of sentence had been pursued and argued on appeal. So of course was an increase in sentence, as in ***Borneo***. In fact ***Borneo*** itself illustrates that the possibilities on an appeal on sentence were

i. **increase sentence from date of conviction then deduct time spent on remand**,

ii decrease sentence from date of conviction, then deduct time spent on remand, or

iii leave sentence from date of conviction unchanged, and deduct time spent on remand.

29. The logical possible outcomes of option (i) would be either: -

a. **an increase in sentence – if sentence were increased in excess of time spent on remand,**

b decrease in sentence – if sentence were increased by less than time spent on remand,

c. sentence unchanged – if sentence were increased by the same amount as time spent on remand.

30. It is a fundamental fallacy to contend, as the applicant does, that he is being treated differently and unequally to those who received the "benefit" of the decision in ***Borneo***. As illustrated above there is no such benefit. To contend that he, like others, would have had his sentence reduced had he only delayed his appeal so as to get the benefit of the ***Borneo*** decision is misconceived.

31. There is no "benefit" from the ***Borneo*** decision in the sense of an automatic reduction in his sentence by time spent on remand. It was merely a possibility, which was not pursued by argument in support of the notice of appeal on sentence. To elevate it to the right to an automatic deduction, after it was deliberately not pursued, is to ask the High Court in the exercise of its original constitutional jurisdiction, to speculate that the outcome of that argument on appeal would have been a reduction of the applicant's sentence by the time spent on remand, and to give effect to it by ordering his release. This is a result which is not open to the High Court, even exercising Constitutional jurisdiction, in the light of the actual effect of ***Borneo***.

**Inequality of treatment**

32. The applicant seeks to contend that:-

a. in so far as other persons had their time in custody pending conviction taken into account, and

b. in so far as that represents the law in this jurisdiction since the decision of ***Borneo***, and

c. in so far as he has not had the benefit of that decision applied to him, either by an appropriate reduction in his sentence by the Court of Appeal, or by administrative recognition of the alleged change in law,

he is being treated differently from similarly circumstanced persons, and such inequality of treatment amounts to a breach of his constitutional rights .

33. This argument's attraction is superficial only, and on analysis proves to be flawed. First of all the applicant must demonstrate that he is being treated differently from similarly circumstanced persons.

34. The persons that the claimant claims to be similarly circumstanced are as follows:-

i. Martin and Clarke – their appeals were determined on July 28th 2011, and their conviction and sentence affirmed by the Court of Appeal.

ii. Burnett – his appeal was determined on March 24th 2011, on retrial a verdict of manslaughter was substituted, and he was sentenced by the Court of Appeal.

iii. Ragbir – he **appealed sentence** to the Court of Appeal.

iv. Cortez – he was sentenced by the High Court to imprisonment for 12 months on a drug trafficking charge.

v. Linares – he specifically **appealed sentence** to the Court of Appeal.

35. In all of these cases the alleged comparators were, save for Cortez, persons who appealed their sentence to the Court of Appeal, and/or had the issue of their sentence raised frontally before it. For example Burnett's sentence for murder had to be revisited when that verdict was substituted for one of manslaughter. In the case of Cortez he was sentenced before the High Court and his sentence ran from the date of his conviction. The allegation was sought to be made from the Bar Table that he was in custody awaiting trial, and that was taken into account in his receiving what would appear to be a relatively light sentence. There is however no evidence that this is so, or that he is in any way similarly circumstanced to the applicants Bohorquez or Olivares.

36. Even if he had been in pretrial custody and that was taken into account, and even if his status as a comparator were to be accepted, this does not establish the applicants' claim of inequality of treatment, as

a. nothing prevented the instant applicants from raising the issue of their sentence on appeal, and

b. there is no guarantee that if the issue of their sentence had in fact been placed before the Court of Appeal, there would have been any automatic deduction from their sentence, of the time they had spent on remand, without further consideration of what was the appropriate sentence, with the possibility of an increase.

All of the alleged comparators, allegedly similarly circumstanced persons, save for Cortez, appealed their sentences, and thereby specifically invited the Court of Appeal to consider a reduction thereof based on time spent in custody pending trial.

37. The claimant did file a notice of appeal on sentence, but review of the written submissions filed, the transcript of proceedings, (which were made available to attorneys at law for both parties), and the full written judgment of the Court of Appeal, reveal that no arguments were addressed to it on the sentence of the claimant.

38. If they had been, the Court of Appeal would have had the opportunity to consider whether the claimant's sentence should have remained the same, should have been increased, or should have been reduced.

39. ***Callachand*** was already decided and could have been adduced in support of a reduction based on time spent awaiting trial on remand. Even if full credit for time spent awaiting trial on remand was not automatic at that time, (until the decision in ***Borneo*** applying Ajay Dookee), **some** credit was still possible based on the law as it then stood. In fact the same Court of Appeal Panel as decided the case of the applicant, heard and decided ***Borneo***. There is no reason

whatsoever to believe that the Panel was either not aware of ***Callachand*** or would not have applied it in the same way as they applied it in ***Borneo***, if the appeal on sentence had been pursued.

40. The fact that he did not pursue his argument on sentence on appeal means that he cannot claim to be similarly circumstanced to those persons who did so, and so received via the Court of Appeal, by that process, a deduction from sentence of time spent on remand.

41. Furthermore, in ***Borneo*** that panel did **not simply deduct time spent on remand**. In Borneo – who did appeal both conviction and sentence, the Court of Appeal reviewed the sentence, considered what the **appropriate** sentence should be, decided that the appropriate sentence should have been **increased** to 17 ½ years – an increase over the original sentence of 2 ½ years from the original sentence of 15 years, and **then** proceeded to deduct time spent on remand from the increased sentence.

42. The applicant therefore simply has no right or expectation to the automatic reduction of his sentence by the time spent on remand for which he asks this court to give effect in the exercise of a constitutional jurisdiction. A review of the sentence for someone convicted of trafficking 21.3kg of cocaine could well have resulted in an increase in sentence followed by a reduction thereof by the period of time spent on remand. The result of that exercise may even have been an increase in overall sentence.

43. To contend now that the Court of Appeal failed to treat the applicant similarly to others who received the "benefit" of ***Borneo*** fails to take into account that that benefit actually is :-

a. a consideration, on a sentencing or resentencing exercise, to a determination of the appropriate sentence bearing in mind the gravity of the offence, and taking into account the mitigating and the aggravating circumstances,

b. to have the time spent on remand deducted from the sentence, and

c. to have the sentence expressed in a standardized format to make it clear that time spent on remand has been taken into account in the sentence.

Before ***Borneo*** courts were apparently expressing sentences in different ways, making it difficult to compare like with like, and leaving it less than obvious in some cases whether time spent on remand had been credited or taken into account in the sentence, and if so, to what extent.

44. On a resentencing exercise therefore, the Court of Appeal had the jurisdiction to determine the appropriate sentence, and even **increase it,** in accordance with the standard applicable to that type of offence, in addition to deducting time spent on remand.(In ***Borneo*** – who did appeal both conviction and sentence, the appropriate sentence, taking into account the gravity of the offence, and then aggravating and mitigating factors, was determined to be 17 and ½ years, an increase over his original sentence of 15 years. Only then was it reduced by the time spent on remand).

45. The Court of Appeal was clearly not invited to consider sentence in relation to the applicant on his appeal, as the Notice of Appeal on sentence was not followed up by the arguments thereon, as revealed in the written submissions filed on his behalf. To now contend

that his sentence would have been reduced by the amount that he claims – full deduction from sentence of time spent on remand, is simply optimistic speculation, and ignores the possibility that someone who is charged with possession of 21.3 kg of cocaine for the purpose of trafficking may even have had their sentence of 10 years increased by the Court of Appeal if he were to have pursued his appeal on sentence.

46. If even however the applicant had presented arguments on the length of his sentence, and sought the exercise of the Court of Appeal's resentencing jurisdiction, and those had been ignored, then there is no reason why the claimant could not have further appealed to the Privy Council.

47. In the instant case the claimant did not appeal his conviction or sentence to the Privy Council. Even if the Court of Appeal erred in law in not applying ***Callachand*** in his case, that error would be one of substantive law, rectifiable on appeal, which cannot entitle the claimant to constitutional relief.

48. However from the transcript of the appeal proceedings and from the written submission filed on his behalf it is clear that he did not even, at the Court of Appeal, pursue his appeal on sentence. And Olivares did not even appeal to the Court of Appeal. Neither can be similarly circumstanced to such persons who did pursue their appeal on sentence, and who thereby received the benefit of a reconsideration of their sentence and a deduction of time spent on remand. Similarly, they cannot complain of breach of a due process right when the procedure existed for an appeal.

49. It is obvious that the High Court, even exercising its original Constitutional jurisdiction, cannot sit in **appeal** of a **substantive** Court of Appeal decision. To ask it in effect to do so amounts to a clear abuse of process.

50. It is also obvious that the initial sentencing court, the High Court, cannot be said to have erred when it did not apply ***Callachand*** or ***Borneo***. Those cases had not yet been decided.

51. The applicant asks this court to speculate that the Court of Appeal would simply have deducted the time spent on remand without altering the initial sentence. By not appealing, however, the application to the High Court in the exercise of its Constitutional jurisdiction, ignores the possibility that the proper sentencing court, the Court of Appeal, which would have had all the facts, matters, circumstances, and evidence before it on review, to aid it in exercising its sentencing discretion, may have increased the sentence, and **then** deducted the time spent on remand. It even ignores the possibility that the result of that exercise may have been an **overall increase in sentence**.

52. The basis alleged for the exercise of any constitutional jurisdiction by the High Court is the failure of the applicant to receive the benefit of a reduction of sentence, by the time spent on remand, which others received after the decision in ***Borneo***. Leaping to the conclusion that had the applicant actually sought such relief he would have benefitted by a sentence automatically reduced by time spent on remand, and therefore, compared to others who did so, he has received less favourable treatment than they did, cannot be the basis for such constitutional relief. Constitutional relief cannot be based on such a logical fallacy. He must demonstrate that he is

similarly circumstanced to others who received more favourable treatment. There is no basis in fact to substantiate that he is similarly circumstanced to persons who actually raised and pursued the issue of their sentence on appeal.

53. The claimant was represented by counsel at the Court of Appeal. He cannot contend that he was not afforded a hearing, or that natural justice was breached, or that the opportunity to argue the point was not afforded to him.

54. However he raises the more subtle argument that in effect he was deprived of that opportunity, as the law pre ***Borneo*** would have rendered any argument that his time on remand be deducted, an exercise in futility. This is also based on a fallacy. It ignores the fact that ***Callachand***, though it had been decided after the claimant's conviction at the Assizes, was, by the time that his appeal was being heard, available to the applicant to raise in support of this claim.

55. The argument that it was only after ***Ajay Dookee*** had been decided that he could have been confident that he would be entitled to a substantial remission in respect of time spent on remand carries no weight whatsoever. After the decision in ***Callachand***, and even before, (for example in ***Paul Williams***), it was clear that the argument could have been raised that some, if not all, of the time spent on remand could have been deductible from sentence.

56. It is also clear however, as in ***Borneo,*** that the Court of Appeal, in the exercise of its discretion to review sentence, could also revise sentence upwards at the same time that it made an adjustment deducting time spent on remand.

57. Two possibilities exist. Either the claimant did not pursue his appeal on sentence, or he did but the Court of Appeal failed to consider them. Review of the Court of Appeal file reveals that written submissions were filed which dealt only with conviction, and the extensive written decision of the Court of Appeal addresses the arguments raised therein.

58. If the appellant had been afforded the opportunity on appeal to argue the point but did not avail himself of such opportunity then he cannot later say that the failure to adjust his sentence was procedurally wrong, and in breach of natural justice. The several authorities set out hereunder are clear on this point.

59. If the appellant had been afforded the opportunity on appeal to argue the point and did avail himself of such opportunity, but the Court of Appeal declined to make a deduction from sentence of time he spent on remand, (the second possibility, for which there is no evidence whatsoever), then it was open to him to further appeal to the Privy Council, or at least explain why he did not do so.

60. An appeal on sentence, and the exercise that this court would necessarily have to embark upon in order to give proper effect to a review of sentence, are indistinguishable. This clearly

demonstrates that the former was the appropriate alternative remedy, and that the failure to pursue it in a timely manner renders the instant claim an abuse of process.

61. It requires this court in effect to sit as a Court of Appeal in relation to the exercise by the Court of Appeal of its appellate criminal jurisdiction, so as to make the finding, necessary to the granting of constitutional relief that the Court of Appeal, erred in relation to the exercise or non exercise of its resentencing jurisdiction. This it cannot do.

62. The claimant failed to avail himself of the opportunity to obtain such a finding by appeal to the Privy Council, the body capable of sitting in appeal of the decision in question. It is an abuse of process to seek such a determination from the High Court.

63. There is no logical or credible explanation offered for his failure to raise the issue of his sentence on his **original** appeal to the Court of Appeal itself. It is therefore a further abuse of process in that the affidavit of the claimant establishes **no factual basis** for his contention that the actions or omissions of the Court of Appeal in relation to the exercise/ failure to exercise its sentencing jurisdiction to reduce his sentence, were of such a nature as to give rise to or afford constitutional redress.

64. Further the applicant has not demonstrated that all persons who are currently incarcerated are having their sentences recalculated administratively since ***Borneo***, and having the time spent in custody awaiting trial automatically deducted from their sentence if the sentencing court has not expressly done so, resulting in their, but not his, earlier release.

65. If that were being done administratively it would be a curious interpretation of ***Borneo*** to extra judicially interfere with the sentence of a court, or appeal court, without statutory or constitutional justification. There is no credible evidence that that is happening.

**LAW**

**Alternative remedy**

66. The Defendant's submits that once there is an alternative remedy the Constitutional Court should not invoke its jurisdiction to grant relief. In **Maharaj v The Attorney General of Trinidad and Tobago (No. 2) (1978) 30 WIR 310** at page 321 (a) the Court stated:

*"In the first place,* ***no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court****. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1 (*a*), and no mere irregularity in procedure is enough, even though it goes to jurisdiction;* ***the error must amount to a failure to observe one of the fundamental rules of natural justice****. Their Lordships do not believe that this can be anything but* ***a very rare event****."*

Further at *at 321e -"In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within s 6 unless it has resulted, is*

*resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on an appeal to an appellate court.* ***It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under s 6(1), with a further right of appeal to the Court of Appeal under s 6(4). The High Court, however, has ample powers, both inherent and under s 6(2), to prevent its process being misused in this way****; for example, it could stay the proceedings under s 6(1) until an appeal against the judgment or order complained of had been disposed of."*

67. In **Thakur Jarooo v The Attorney General of Trinidad and Tobago [2002] UKPC 5** at paragraph 14 of its decision the Privy Council noted:-

*[14] The Court of Appeal also rejected the appellant's argument under s 4(a). But Hosein JA, in a judgment with which de la Bastide CJ and Ibrahim JA agreed, raised the question for the first time whether the constitutional route which the appellant had chosen for his application was appropriate. The question which he posed was whether proceedings under the Constitution ought really to be invoked in matters where there is* ***an obvious available recourse under the common law****. He referred to Lord Diplock's observation in* Harrikissoon v A-G *(1979) 31 WIR 348 at 349 that the mere allegation of constitutional breach was insufficient to entitle the applicant to invoke the jurisdiction of the court under what is now s 14(1) of the Constitution if it was apparent that the allegation was frivolous or vexatious or an abuse of the process of the*

*court as being made* ***solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy****. He said that in his opinion the appellant's motion was inescapably doomed to failure on the merits. But he also said that it* ***connoted a resort to proceedings under the Constitution which lacked bona fides and was so clearly inappropriate as to constitute an abuse of process****.*

At Paragraph 39 of the Jaroo decision the Court stated:

*"Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened.* ***He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it…."***

68**.** .In **Forbes v Attorney General of Trinidad and Tobago [2002] UKPC 21** the Appellant sought to appeal the decision of the Court of Appeal affirming his sentence and conviction in the absence of the Magistrate's reasons. The Privy Council at Paragraph 13 of its judgment stated:-

***"****The appellant has spent two periods in custody, one of nineteen months as a prisoner on remand and one of eleven months as a convicted prisoner serving a term of imprisonment with hard labour. The first was the result of a conviction which cannot be shown to be safe; the second was the result of an* ***error of law*** *on the part of the Court of Appeal in upholding the conviction. The conviction has now been quashed.* ***The question, therefore, is whether a person who has served a term of imprisonment before his conviction is quashed on appeal has been***

***deprived of his constitutional rights to due process and the protection of the law****."* (Emphasis added)

69. At paragraph 15 (citing **Chokolingo v A.G** [1981] 1 WLR 106) Lord Diplock stated:

***'Acceptance of the applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under s 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee.*** *These parallel remedies would be also cumulative since the right to apply for redress under s 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available. The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal,* ***he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld****, by making an application for redress under section 6(1****) to a court of co-ordinate jurisdiction, the High Court.*** *To give to Chapter I of the Constitution an interpretation which would lead to* ***this result*** *would, in their Lordships' view, be* ***quite irrational and subversive of the rule of law*** *which it is a declared purpose of the Constitution to enshrine."*

***[16]*** *In Nankissoon Boodram v Attorney-General (1995) 47 WIR 459, the appellant, who was on trial for murder, complained that his constitutional rights had been infringed by continuing press reports which were calculated to prejudice his trial and by the failure of*

*the Director of Public Prosecutions to take measures to forestall or prevent their publication. His constitutional motion was dismissed by the Court of Appeal and its decision was affirmed by the Board. Lord Mustill said (at pp 494, 495):*

*'The "due process of law" guaranteed by this section has two elements relevant to the present case. First, and obviously, there is* ***the fairness of the trial itself****. Secondly, there is the availability of the mechanisms which enable the trial court to protect the fairness of the trial from invasion by outside influences. These mechanisms form part of the "****protection of the law****" which is guaranteed by s 4(b),* ***as do the appeal procedures designed to ensure that if the mechanisms are incorrectly operated the matter is put right. It is only if it can be shown that the mechanisms themselves (as distinct from the way in which, in the individual case, they are put into practice) have been, are being or will be subverted that the complaint moves from the ordinary process of appeal into the realm of constitutional law*** *...*

***…****The Board held that, since the appellant had been* ***represented by counsel on his appeal against conviction*** *and this had* ***enabled him to argue any matters reasonably open to him****, the* ***ordinary appellate processes had given him adequate opportunity to vindicate his right to a fair hearing, so that his constitutional motion had properly been dismissed****. Lord Bingham of Cornhill said (at para [24], p 114):*

*'It would be undesirable to stifle or inhibit the grant of constitutional relief in cases* ***where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal****. As it is a living, so the Constitution must be an effective, instrument. But Lord Diplock's salutary warning remains pertinent:*

***a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision*** *...* ***The appellant's complaint was one to be pursued by way of appeal against conviction****, as it was ...'*

70. The Court in **Forbes** (at paragraph 18 of its judgment), stated, "*Their lordships do not think that it would be helpful or desirable to add their own observations to the foregoing citations. They establish that it is only in rare cases where there has been* ***a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated, it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error.*** *This is the reason for* ***the appellate process****. In the present case the appellant was deprived of his liberty after a fair and proper trial before the magistrate, that is to say by due process of law.* ***The appellant was able to challenge his conviction by way of appeal to the Court of Appeal and, when the Court of Appeal wrongly failed to quash his conviction, by way of further appeal to the Board****. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process.* ***The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His constitutional rights have not been infringed, and the courts of Trinidad and Tobago were right to dismiss his constitutional motions."*** (Emphasis added)

**Delay**

71. The Defendant contends, inter alia, that failure of the Court of Appeal, (if any), to deduct time spent on remand would not have been capable of constituting a procedural error but rather a

substantive **error of law** which was rectifiable by way of appeal. The Claimant did have the alternative remedy of applying for special leave to appeal to the Privy Council in relation to the determination and judgment of the Court of Appeal in his criminal trial. The fact that he did not do so, and has delayed long past the time when he could have done so, to now seek constitutional relief, is itself an abuse of process, as recognized by the Privy Council in **Durity v Attorney General of Trinidad and Tobago [2002] UKPC 20**.

72. It stated, (at Paragraph 35), "*In this context the Board consider it may be helpful if they make certain general observations. When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been* ***delay such as would render the proceedings an abuse or would disentitle the claimant to relief,*** *it will usually be important to* ***consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction.*** *This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in Harrikissoon v A-G of Trinidad and Tobago [1980] AC 265, [1979] 3 WLR 62, 268 of the former report. An application made under s 14* ***solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy*** *for unlawful administrative action* ***is an abuse of process***. (Emphasis added)

**Alleged Right to Remission of Sentence**

73. The claimed right to remission of sentence by one third emanates from statute and in particular the Prison Rules. It is not a right. Its nature was clarified by decisions of the Caribbean Court of Justice in **Da Costa Hall v The Queen CCJ Cr 1 of 2010** delivered 15th April 2011 **-- per Nelson JA and Witt JA as follows:**

Per the Honourable Nelson J para 28:"Remissions *of sentence have to be earned and are normally effected by administrative action during a prisoner's incarceration"*

Per the Honourable Wit J paragraph 55: remissions of sentence fall within the purview of prison administration and should not, except in the odd case of judicial review, be handled by the courts.

Remission of sentence on the ground of good behavior is therefore a matter of administrative discretion, and not a matter to be automatically applied by a constitutional court.

74. That aspect of Prison administration is not normally within the purview of the courts, and a claimant cannot demand an automatic remission of his sentence by one third, on his own claim to have been of good behaviour, especially where, as here, that claim is challenged by the Prison Administration.

**Orders**

75. i. The claimant's claim is dismissed.

ii. The claimant is to pay to the Defendant costs to be assessed in default of agreement.

**Dated this 21st day of February 2014**

**…….**

**Peter A. Rajkumar**

**Judge**